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**UNITED STATES DISTRICT COURT  
 NORTHERN DISTRICT OF CALIFORNIA  
 SAN FRANCISCO DIVISION**

In re: CATHODE RAY TUBE (CRT)  
 ANTITRUST LITIGATION

Case No. 07-5944 SC  
 MDL No. 1917

This Document Relates to:

Case No. C 11-6397 SC

COSTCO WHOLESALE CORPORATION,

Plaintiff,

v.

HITACHI, LTD., et al.,

Defendants,

**THE PHILIPS DEFENDANTS' MOTION,  
 IN THE ALTERNATIVE TO DISMISSAL,  
 TO COMPEL ARBITRATION AND  
 SUPPORTING MEMORANDUM**

**ORAL ARGUMENT REQUESTED**

Date: July 9, 2013  
 Time: TBD.  
 Before: Hon. Charles A. Legge, U.S.  
 Judge (Ret.), Special Master

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**NOTICE OF MOTION AND MOTION**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

On August 17, 2012, Defendants Koninklijke Philips Electronics N.V. (“KPE”) and Philips Electronics North America Corporation (“PENAC”) (collectively the “Philips Defendants”) filed a motion to dismiss claims asserted by the Direct Action Plaintiffs (“DAPs”), including Costco, against the Philips Defendants on the basis that the claims were barred by the statute of limitations. (Dkt. No. 1319) On May 2, 2013, Special Master Legge issued a Report and Recommendation that, *inter alia*, recommended that the Court grant the Philips Defendants’ motion and dismiss the DAP claims without leave to amend. (Dkt. No. 1664) The Philips Defendants intend to promptly move the Court to adopt Special Master Legge’s Report and Recommendation as to the Philips Defendants’ Motion which, if granted, would dismiss the DAP claims against the Philips Defendants, including the claims asserted by Costco that are the subject of this alternative motion to compel arbitration. As will be set forth in the Philips Defendants’ papers moving the Court to adopt the Report and Recommendation as to the dismissal of the Philips Defendants, the Special Master’s Report and Recommendation provides sound grounds to dismiss all DAP claims asserted against the Philips Defendants. The Philips Defendants note, however, that the briefing schedule regarding the motions to adopt the Report and Recommendation, any objections thereto, and the Court’s resolution of the various motions will likely to take some months to resolve. The Philips Defendants therefore file this motion to compel arbitration solely as an alternative to dismissal to avoid any delay relating to the assertion and preservation of their arbitration rights.

Therefore, and subject to the foregoing, PLEASE TAKE NOTICE that on July 9, 2013, at 11:00 a.m., or as soon as the matter may be heard by the Honorable Charles A. Legge, U.S. District Court Judge (Ret.), Special Master, in the San Francisco, California, 94111, Philips Defendants will and hereby do move the Court pursuant to Chapter 1 of the Federal Arbitration Act (“FAA”), 9 U.S.C. § 3, and Rule 12(b)(6) of the Federal Rules of Civil Procedure, for an order compelling arbitration of all of Costco Wholesale Corporation’s (“Costco”) claims based on direct or indirect purchases of cathode ray tubes (“CRT”) from the Philips Defendants and dismissing this action regarding these claims.

1 If its claims are not dismissed as untimely, Costco must be compelled to arbitrate its claims  
 2 against the Philips Defendants because Costco drafted and entered into a valid, written arbitration  
 3 agreement that broadly covers all claims “arising out of or relating to” the claims asserted. That  
 4 agreement was entered into directly between Costco and the Philips Defendants, including PENAC.  
 5 Moreover, Costco alleges that any non-signatory Philips Defendants were “agents” of the signatory  
 6 and that all Philips Defendants are jointly and severally liable.<sup>1</sup> Because all of Costco’s claims  
 7 based on the direct or indirect purchases from the Philips Defendants are subject to arbitration, the  
 8 Court should grant this motion, dismiss the action as it pertains to these claims, and compel Costco  
 9 to proceed with arbitration.

10 Significantly, this Court has already found on two different occasions that Costco’s claims  
 11 regarding the *exact* same Costco Vendor Agreement and Standard Terms and, in particular, the  
 12 mandatory arbitration provisions contained therein, required arbitration.<sup>2</sup> The outcome should be no  
 13 different here.

14 This motion is based upon this Notice of Motion, the accompanying Memorandum of Points  
 15 and Authorities and accompanying exhibits, argument of counsel, and such other matters as the  
 16 Court may consider.

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24 <sup>1</sup> *Costco Wholesale Corp. v. Hitachi, Ltd. et. al.*, No. 3:11-cv-06397-SC (W.D. Wash. Nov. 14, 2011), Dkt. (“Compl.”)  
 25 ¶¶ 9, 55-57.

26 <sup>2</sup> *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, Nos. M 07-1827 SI, C 09-05609 SI, 2011 WL 2650689 (N.D. Cal.  
 27 July 6, 2011) (“LCD Arbitration Order”) (Judge Illston’s Order Compelling Arbitration); *In re: Cathode Ray Tube (CRT)*  
 28 *Antitrust Litig.*, No. 07-5944 SC (N.D. Cal.) (“CRT MDL”) (November 7, 2012) Dkt. 1433 (“Special Master Legge’s  
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 Adopting Special Master Legge’s Recommendation Compelling Arbitration) (“CRT Arbitration Order”).

**MEMORANDUM OF POINTS AND AUTHORITIES**

**I. STATEMENT OF THE ISSUE**

Whether the broad, mandatory arbitration agreement drafted by Costco, which imposes arbitration of “all claims and disputes . . . arising out of or relating to” Costco’s relationships with its CRT Finished Product vendors, covers Costco’s federal and state-law conspiracy claims against the Philips Defendants based on the direct and indirect purchases of CRT Finished Products from the Philips Defendants, thus requiring dismissal of this action as to the Philips Defendants and an order directing Costco to arbitrate these claims?

**II. INTRODUCTION**

Costco’s Complaint asserts federal and state-law claims based upon allegations of a CRT price-fixing conspiracy among Defendants Koninklijke Philips Electronics N.V., Philips Electronics North America Corporation, Philips Electronics Industries (Taiwan), Ltd, and Philips da Amazonia Industria Electronica Ltda. and their alleged co-conspirators.<sup>3</sup> Costco alleges that “[e]ach Defendant acted as the principal, agent or joint venturer of, or for other Defendants,’ that each member of each Defendant’s corporate family “engaged in conspiratorial meetings on behalf of every company in that family,” and that “all entities within the corporate families were active, knowing participants” in the alleged conspiracy. Compl. ¶¶ 55-57. Costco’s claims are subject to the broad and mandatory arbitration agreements that Costco imposed on all of its suppliers. In February of 2013, the Philips Defendants, through production of documents by Costco, discovered the July 31, 1995 Vendor Agreement executed between Costco and Philips Consumer Electronics Corporation (the “Vendor Agreement”) that included Costco’s standard broad and mandatory arbitration terms and conditions.<sup>4</sup> See Declaration of Erik T. Koons in Support of the Philips Defendants’ Motion in the Alternative to Compel Arbitration, dated May 9, 2013 (“Koons” Decl.) Ex. A. The relationship between Costco and the Philips Defendants was covered by and subject to the Costco Standard Terms that, by its

<sup>3</sup> Philips Electronics Industries (Taiwan), Ltd. and Philips da Amazonia Industria Electronica Ltda. do not join this motion as neither entity has been served in this action, and the assertion of personal jurisdiction over either would not comport with due process.

<sup>4</sup> Philips Consumer Electronics Corporation is a division within PENAC. Koons Decl. ¶ 3. The Philips Defendants reserve all rights to amend this motion if Costco comes forward with additional agreements with different dispute resolution terms and conditions.

own language, required mandatory arbitration of “ [REDACTED] ” to the Vendor Agreement. Koons Decl. Exs. B-E ¶ 20. Pursuant to the FAA, the Court should enforce this arbitration agreement by dismissing this action as it pertains to the Philips Defendants.

On August 17, 2012, the Philips Defendants filed a motion to dismiss the DAP claims against the Philips Defendants as being barred by the statute of limitations. (Dkt. No. 1319). On May 2, 2013, Special Master Legge issued his Report and Recommendation concluding that the DAP claims, including Costco’s complaint, were barred by the statute of limitations. (Dkt. No. 1664). He recommended that the Court grant the motion to dismiss the Philips Defendants without leave to amend. *Id.* The Report and Recommendation provides a sound basis for the dismissal of the DAP claims against the Philips Defendants and the Philips Defendants will promptly move the Court to adopt the Report and Recommendation as to their individual motion to dismiss. The Philips Defendants file this motion to compel arbitration solely as an alternative to their motion to dismiss based on the statute of limitations. The Philips Defendants only recently discovered the basis for their motion to compel arbitration and, out of an abundance of caution, do not wish to delay this formal demand to perfect their rights to mandatory arbitration.

### **III. FACTUAL BACKGROUND**

#### **A. Procedural History**

On November 14, 2011, Costco filed its Complaint in the United States District Court for the Western District of Washington against the Philips Defendants and others. Compl. ¶¶ 34-38. The action was transferred to the MDL on December 20, 2011.<sup>5</sup> As previously described in the Defendants’ Joint Notice of Motion and Motion to Dismiss and for Judgment on the Pleadings as to Certain Direct Action Plaintiffs’ Claims,<sup>6</sup> the Costco Complaint does not specify from whom, when, or where Costco bought “CRT Products,” a term Costco lumps together as CDTs, products containing CDTs, CPTs, and products containing CPTs. Compl. ¶ 2. Costco is clear, however, that

<sup>5</sup> CRT MDL, Clerk’s Notice, Dkt. 1016.

<sup>6</sup> CRT MDL, Dkt. 1317 at 17-18, 26, 28, 30.



1 it seeks recovery from the Philips Defendants for any and all purchases of “CRT Products” by  
2 Costco “from any source.” Compl. ¶ 9.

3 On May 15, 2012, PENAC and Toshiba America Electronic Components, Inc. served their  
4 first set of document requests (“Document Requests”) on Costco seeking the production of, among  
5 other things: “[f]or each purchase or potential purchase by You of any CRT or CRT Product, all  
6 contracts, purchase orders, agreements or memoranda of understanding, or any other Document that  
7 contains any term or condition of sale, including all exclusive contracts, master purchase  
8 agreements, purchase orders, invoices, cost-plus contracts and most favored nation contracts, and  
9 purchase order acknowledgements.”<sup>7</sup> Koons Decl. Ex. F. Costco failed to produce any documents  
10 pursuant to this or any other Document Request.

11 On December 7, 2012, before Costco produced any documents, Costco’s Rule 30(b)(6)  
12 corporate representative testified that [REDACTED]

13 [REDACTED]  
14 [REDACTED]. *Id.* Ex. G.<sup>8</sup> In light of Costco’s failure to produce any  
15 vendor agreements or related documents in response to the Document Requests, on January 10,  
16 2013, the Defendants requested that Costco immediately search for and produce all vendor  
17 agreements, or any agreements containing an arbitration provision that Costco utilized with any  
18 Defendant relating to the purchase of CRTs or products incorporating CRTs during the period 1995-  
19 2007. *Id.* at Ex. H. PENAC’s counsel expressly stated that Defendants requested these documents  
20 so that each Defendant could assess whether a vendor agreement with a mandatory arbitration  
21 provision governed the sales of products containing CRTs to Costco. *Id.* On January 18, 2013,  
22 Costco replied that it would search for and produce any responsive, non-privileged documents. *Id.* at  
23 Ex. I. On February 11, 2013, Costco produced various vendor agreements, standard terms, and other  
24 related documents -- including a Vendor Agreement between PENAC and Costco. *Id.* at Ex. A-E  
25 and J.

26 <sup>7</sup> Other document requests that PENAC and Toshiba served on Costco also required Costco to produce its Vendor  
27 Agreements, Standard Terms, and related documents.

28 <sup>8</sup> Deposition of Geoff Shavey, Costco 30(b)(6) at 41:3-42:19, 117:14-118:5. On August 17, 2012, Costco did produce  
transactional data of Costco’s CRT Finished Product sales from September 2, 1996 through January 17, 2010.

1 The Vendor Agreement governs the purchases upon which Costco asserts its claims against  
 2 the Philips Defendants and adopts by reference the dispute resolution procedures found in every  
 3 iteration of Costco's "Standard Terms." *Id.* at Ex. A at A and Exs. B-E at ¶ 20. All of the Standard  
 4 Terms produced by Costco contain [REDACTED] governing all aspects of  
 5 Costco's purchases of CRTs and CRT Finished Products from its vendors, including the Philips  
 6 Defendants.

7 On April 9, 2013, counsel for the Philips Defendants sent a letter to Costco referencing the  
 8 Standard Terms' mandatory arbitration provisions and -- particularly in light of the fact that the  
 9 Court had found on two separate occasions that the mandatory arbitration provision required Costco  
 10 to arbitrate its claims<sup>9</sup> -- requested that Costco stipulate to arbitrate its claims against the Philips  
 11 Defendants (and obviate this motions practice). *Id.* at Ex. K. By e-mail dated April 16, 2013,  
 12 Costco inquired regarding which of the various vendor agreements that it had executed with Philips  
 13 entities required arbitration of its claims. *Id.* at Ex. L. On April 17, 2013, the Philips Defendants'  
 14 responded that "every Vendor Agreement that Costco had with any Philips entity, including Philips  
 15 Electronics North America, incorporated by reference Costco's 'Standard Terms.' These Standard  
 16 Terms uniformly provide, at [REDACTED]  
 17 [REDACTED]." <sup>10</sup>. *Id.* at Ex. M. The Philips  
 18 Defendants reiterated its position that, "based on the same arbitration provision contained in the  
 19 Toshiba Vendor Agreements, the Court ordered that the claims Costco asserts in the Complaint were  
 20 subject to mandatory arbitration" and, thus, arbitration was required here. *Id.*

21 On April 19, 2013, Costco responded that it would not "consent to file a motion dismissing  
 22 Costco's claims against the Philips defendants...." *Id.* at Ex. N. On April 22, 2013, counsel for the  
 23 Philips Defendants sought clarification that Costco's refusal to jointly move to dismiss Costco's  
 24

25 <sup>9</sup> *Supra* fn. 2.

26 <sup>10</sup> The Philips Defendants also noted that, "without limiting our position, and in light of the potential for additional  
 27 discovery, all available information supports Philips' position that it is entitled to enforce arbitration rights here." Koons  
 28 Decl. Ex. M. Consistent with this position, the Philips Defendants reserve all rights to amend this motion if Costco  
 comes forward with additional agreements requiring mandatory arbitration of the subject claims and / or any agreements  
 that contain different dispute resolution terms and conditions.

claims against the Philips Defendants also meant that it was Costco's position that the standard terms of its vendor agreements had no application to its claims against the Philips Defendants. *Id.* at ¶ 17. Counsel for Costco stated that Costco would oppose any effort to arbitrate the claims. *Id.*

**B. Costco Alleges A Single Conspiracy That Caused Costco Damages As To Its Purchases "From Any Source"**

Costco alleges that the Philips Defendants and other CRT and CRT Finished Product manufacturers "conducted a conspiracy extending at a minimum from March 1, 1995, through November 25, 2007" to "rais[e] or maintain[] prices and [to] reduc[e] capacity and output" for cathode ray tubes ('CRTs')." Compl. ¶ 1. Costco alleges that it purchased CRT Finished Products at a price over what it would have paid absent the alleged conspiracy. *Id.* at ¶¶ 3, 180, 183, 187, 191, 198, 202. Costco does not further specify what it purchased or from whom. According to Costco, it was allegedly injured based upon purchases "for CRT Products from any source." Compl. ¶ 9.

Costco alleges that "[e]ach Defendant acted as the principal, agent or joint-venturer of, or for, other Defendants;" that each member of each Defendant's corporate family "engaged in conspiratorial meetings on behalf of every company in that family;" and that "all entities within the corporate families were active, knowing participants in the alleged conspiracy." *Id.* at ¶¶ 55-57. Based upon these allegations, Costco brings claims under Section 1 of the Sherman Act, 15 U.S.C. § 1, the California Cartwright Act, Cal. Bus. & Prof. Code § 16700 *et seq.*, the Washington Consumer Protection Act, Wash. Rev. Code § 19.86.030, the Arizona Antitrust Act, Ariz. Rev. Stat. § 44-1401 *et seq.*, the Florida Deceptive and Unfair Trade Practices Act, Florida Stat. § 501.201 *et seq.*, and the Illinois Antitrust Act, 740 Illinois Code 10/1 *et seq.* *Id.* at ¶¶ 174-203.

**C. Costco's Vendor Agreement Requires Arbitration Of All Claims "Arising Under Or Related To" Costco's Purchases**

Costco's Vendor Agreement with the Philips defendants is the standard agreement Costco used with its suppliers that Costco itself drafted to governing the entire relationship between Costco and each supplier.<sup>11</sup> *See* Koons Decl. Ex. A. ( [REDACTED] )

<sup>11</sup>It is evident on the face of the Vendor Agreement that it is a standard form agreement authored by Costco for use with its suppliers: [REDACTED]

1 [REDACTED]  
 2 [REDACTED]). Costco also insisted that the Vendor Agreement take  
 3 priority over any inconsistent terms in other agreements between the parties. *Id.* at Ex. B.

4 Costco would also notify its vendors of updates to its Standard Terms that Costco stated  
 5 replaced prior Standard Terms. *Id.* at Ex. A, ¶ A (“[REDACTED]  
 6 [REDACTED]”); Exs. C and E. Costco updated its Standard Terms in  
 7 1994, 1997, 2000, and 2004. *Id.* at Exs. B-E. All four versions of the Standard Terms required  
 8 arbitration of “[REDACTED]” arising out of or relating to Costco’s purchases of CRTs and  
 9 other products:

10 [REDACTED]  
 11 [REDACTED]  
 12 [REDACTED]  
 13 [REDACTED]  
 14 [REDACTED]

15 *Id.* at Ex. B-E at ¶¶ 20.<sup>13</sup>

16 Costco brings claims based upon purchases from Philips Consumer Electronics Corp., a  
 17 division of PENAC, with whom Costco entered into a Vendor Agreement. *Id.* at Ex. A. The Philips  
 18 Defendants make no concession that they are liable for the sales of their unnamed and alleged  
 19 affiliates and reserve all rights to contest that liability before the arbitrator or before this Court.<sup>14</sup>

22 [REDACTED]  
 23 See Koons Decl. Ex. A at p. 1-2.

24 <sup>12</sup> The [REDACTED]  
 25 Koons Decl. Ex. A. According to Costco’s website, The Price Company is a predecessor of Costco Wholesale. See  
 26 <http://phx.corporate-ir.net/phoenix.zhtml?c=83830&p=irol-faq> accessible through Costco.com.

27 <sup>13</sup> While there are minor variations of section “20. Disputes and Arbitration” in Costco’s 1994, 1997, 2000, and 2004  
 28 Standard Terms, these variations do not affect the mandatory arbitrability of Costco’s claims. Compare Koons Decl.  
 Exs. B-E ¶ 20.

<sup>14</sup> Such liability is a question of fact for the arbitrator to decide. See *St. Paul Fire & Marine Ins. Co. v. Courtney Enters., Inc.*, 270 F.3d 621, 624 (8th Cir. 2001) (“[T]he court may not rule on the merits of any claim the parties have agreed to arbitrate.”).

1 **IV. ARGUMENT**

2 **A. Legal Standard**

3 The FAA establishes the “liberal federal policy favoring arbitration agreements.” *Moses H.*  
 4 *Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S.Ct. 927, 74 L.Ed. 2d 765 (1983);  
 5 *see also* CRT Arbitration Order p. 4 (“[T]he FAA embodies a policy that generally favors arbitration  
 6 agreements.”). Courts recognize that agreements to arbitrate are to be rigorously enforced. *See*  
 7 *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24-25; CRT Arbitration Order p. 4 (If an “arbitration  
 8 agreement is present...federal courts must enforce it rigorously.”).

9 When considering a motion to compel arbitration, the Court’s role is limited to determining  
 10 whether: (1) the contract containing the arbitration clause relates to a transaction involving interstate  
 11 commerce; (2) a valid agreement to arbitrate exists; and (3) whether the dispute is encompassed  
 12 within the scope of that agreement. *See Simula, Inc. v. Autoliv, Inc.*, 175 F.3d 716, 720 (9th Cir.  
 13 1999) (when considering motion to compel arbitration, “the district court can determine only  
 14 whether a written arbitration agreement exists, and if it does, enforce it in accordance with its  
 15 terms”) (citation omitted); *Rep. of Nicaragua v. Standard Fruit Co.*, 937 F.2d 469, 475-78 (9th Cir.  
 16 1991); *see also* 9 U.S.C. § 4; Convention on the Recognition and Enforcement of Foreign Arbitral  
 17 Awards (the “New York Convention”), 9 U.S.C. § 206. Where there is a valid, enforceable  
 18 arbitration agreement, the Court must compel arbitration. *See* 9 U.S.C. § 4 (“[T]he court shall make  
 19 an order directing the parties to proceed in arbitration in accordance with the terms of the  
 20 agreement”); CRT Arbitration Order p. 4 (must enforce arbitration agreement “rigorously” and  
 21 policy “appl[ies] with special force in the field of international commerce”); LCD Arbitration Order  
 22 p. 3 (“Federal courts are required to rigorously enforce an agreement to arbitrate”); *Estrella v.*  
 23 *Freedom Fin.*, No. C 09-03156 SI, 2011 WL 2633643, at \*2 (N.D. Cal. July 5, 2011) (“Upon a  
 24 showing that a party has failed to comply with a valid arbitration agreement, the district court must  
 25 issue an order compelling arbitration.”) (citation omitted).

26 **B. Costco’s Vendor Agreement Involves Interstate Commerce**

27 The FAA applies wherever an arbitration agreement is a “written provision in...a contract  
 28 evidencing a transaction involving commerce.” 9 U.S.C. § 2. Here, Costco alleges in its Complaint

1 that “a substantial part of the events giving rise to the Plaintiff’s claims...affected interstate  
2 commerce.” *See* Compl. ¶ 61

3 **C. Costco’s Agreement to Arbitrate is Valid**

4 Costco itself drafted the Vendor Agreement and Standard Terms containing the broad,  
5 mandatory arbitration provision. Because no “ground . . . ‘exist[s] at law or in equity for the  
6 revocation’” of any Vendor Agreement, the FAA applies and compels Costco to arbitrate its claims.  
7 *See, e.g., AT&T Mobility LLC v. Concepcion*, -- U.S. --, 131 S. Ct. 1740, 1746, 179 L.Ed.2d 742  
8 (2011); 9 U.S.C. § 2.

9 **D. All of Costco’s Claims As To Direct and Indirect Purchases From The Philips  
10 Defendants Relate To The Vendor Agreement**

11 Costco drafted its Standard Terms with broad and mandatory language providing that “[REDACTED]  
12 [REDACTED]” agreements between Costco and its vendors  
13 must be arbitrated. Koons Decl. Exs. B-E at ¶ 20. The Ninth Circuit has recognized that an  
14 agreement to arbitrate claims “arising out of or relating to” is a broad arbitration clause. *See*  
15 *Mediterranean Enters., Inc., v. Ssangyong Corp.*, 708 F.2d 1458, 1464 (9th Cir. 1983) (noting that  
16 the language “‘arising out of or relating to this agreement’ had been labeled a ‘broad arbitration  
17 clause’” by other courts) (citation omitted). It is well-established that antitrust claims are claims  
18 “arising under” purchase contracts. *See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth Inc.*,  
19 473 U.S. 614, 632, 640, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985) (holding that the antitrust claims  
20 arising under a sales agreement between the parties were arbitrable); *JLM Indus., Inc. v. Stolt-*  
21 *Nielsen SA*, 387 F.3d 163, 181 (2d Cir. 2004) (holding that the plaintiffs’ antitrust claims arising  
22 under a form charter agreement were subject to arbitration). This Court has already found on two  
23 separate occasions that the Standard Terms require arbitration of Costco’s purchases pursuant to the  
24 Vendor Agreement. CRT Arbitration Order p. 2 (“The COURT . . . GRANTS the Toshiba  
25 Defendants’ motion to compel arbitration . . .”); Special Master Legge’s Report and  
26 Recommendation Compelling Arbitration p. 2 (“The Special Master finds that the language in the  
27 Vendor Agreement’s arbitration clause, which applies to ‘[a]ll claims and disputes that . . . arise out  
28 of or relate to” the Vendor Agreement, provides adequate jurisdiction for the Toshiba Defendants’

1 demand to arbitrate.”); LCD Arbitration Order p. 6 (“The Court finds that the arbitration clause  
2 covers Costco’s claims.”).

3 Costco alleges that all of its alleged damages were as a result of its purchases of CRTs and  
4 CRT Finished Products, which are governed by the Vendor Agreement. Compl. ¶¶ 3, 180, 183, 187,  
5 191, 198, and 202. By definition, those purchases “arise out of and relate to” the Vendor Agreement  
6 and, thus, those claims must be arbitrated. *Accord Mediterranean Enters.*, 708 F.2d at 1464.

7 **E. Costco’s Arbitration Clause Covers Federal and State-Law Claims**

8 The Vendor Agreement’s broad and mandatory arbitration provision applies to Costco’s  
9 federal and state-law claims. The Supreme Court has held that Sherman Act claims are arbitrable.  
10 *See Mitsubishi Motors Corp.*, 473 U.S. at 618-19, 624 (holding plaintiffs’ Sherman Act claims  
11 subject to arbitration under FAA); *see also JLM*, 387 F.3d at 175 (rejecting plaintiffs’ argument that  
12 arbitral panel would be incapable of resolving Sherman Act claims). It is also well-established that  
13 state-law antitrust claims are arbitrable, whether brought pendant to Sherman Act claims or on their  
14 own. *See, e.g., Simula Inc.*, 175 F.3d at 719, 726 (arbitration appropriate to adjudicate alleged  
15 violations of mix of federal and state antitrust, trade secret, trademark, and defamation laws).  
16 Relying upon this precedent, this Court has already recognized that Sherman Act and state-law  
17 antitrust claims are arbitrable under the exact same Costco arbitration provision. *See* CRT  
18 Arbitration Order p. 2 (“The COURT . . . GRANTS the Toshiba Defendants’ motion to compel  
19 arbitration . . .”); LCD Arbitration Order p. 5 (“Costco’s state and federal antitrust claims are  
20 likewise subject to arbitration.”).

21 **F. Costco’s Claims Based On Direct And Indirect Purchases From The Philips**  
22 **Defendants Must Be Arbitrated**

23 Costco must arbitrate its claims against the Philips Defendants. As this Court has already  
24 held, a plaintiff is estopped from refusing to arbitrate with a corporate family member that is alleged  
25 to be liable for overcharges incurred on an affiliate’s contract. CRT Arbitration Order p. 9  
26 (“Plaintiff must arbitrate its claims against the Toshiba Defendants whose affiliates - - in this case,  
27 TACP - - have arbitration agreements with Plaintiff”); LCD Arbitration Order p. 8 (“Costco must  
28 arbitrate its claims against those defendants whose affiliates have arbitration agreements with



Costco”); *see also Fujian Pac. Elec. Co. Ltd. v. Bechtel Power Corp.*, No. C 04-3126 MHP, 2004 WL 2645974, at \*6 (N.D. Cal. Nov. 19, 2004) (“[w]hen the charges against a parent company and its subsidiary are based upon the same facts and are inherently inseparable, a court may refer claims against the parent to arbitration even though the parent is not formally a party to the arbitration agreement”) (quoting *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321-22 (4th Cir. 1988)); *JLM*, 387 F.3d at 177-78 (plaintiffs could not avoid arbitration with affiliate of signatory after having treated signatory and its affiliate as single unit in complaint). Although this principle alone would be enough for the Philips Defendants to require Costco to abide by its own arbitration terms, Costco also alleges that all members of a corporate family were “active, knowing participants” in the alleged conspiracy and treats all corporate family members as a single entity. Compl. ¶¶ 34-38, 57, 135. Because Costco alleges that all members of the Philips Defendants’ corporate family are liable for their affiliates’ alleged actions, Costco must arbitrate with all of the named Philips Defendants.<sup>15</sup>

**G. Counsel For The Philips Defendants Attempted To Resolve This Issue Without Filing A Motion to Compel**

On April 9, 2013, counsel for the Philips Defendants sent a letter to counsel for Costco requesting that Costco stipulate to dismissing this action with respect to the Philips Defendants and abide by its agreement to arbitrate all of the claims against the Philips Defendants. Koons Decl. Ex. K. In this letter, counsel for the Philips Defendants noted that the obligation of Costco to arbitrate its claims based on the same Vendor Agreement was decided previously by this Court in both the LCD and CRT litigations. *Id.* On April 16 and 17, 2013, counsel for the Philips Defendants and Costco exchanged emails regarding the agreements that supported the Philips Defendants’ position that it was entitled to enforce arbitration rights in this matter. *Id.* at Exs. L and M. Costco declined to stipulate to arbitration. *Id.* at Ex. N. The Philips Defendants consequently filed this motion

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<sup>15</sup> *See Amisil Holdings Ltd. v. Clarium Capital Mgmt.*, 622 F. Supp. 2d 825, 830 (N.D. Cal. 2007) (“[A]n obligation to arbitrate does not attach *only* to those who actually signed the agreement to arbitrate.”); *JLM*, 387 F.3d at 177 (“under principles of estoppel, a non-signatory to an arbitration agreement may compel a signatory to that agreement to arbitrate”); *Mundi v. Union Security Life Ins. Co.*, 555 F.3d 1042, 1046 (9th Cir. 2009) (“a signatory may be required to arbitrate a claim brought by a non-signatory because of the close relationship between the entities involved, as well as the relationship of the alleged wrongs to the non-signatory’s obligations and duties in the contract and the fact that the claims were intertwined with the underlying contractual obligations.”) (citation omitted).



1 requesting that the Court compel Costco to arbitrate its claims against the Philips Defendants for its  
2 alleged injuries based on the direct and indirect purchases from the Philips Defendants.

3 **V. CONCLUSION**

4 For the foregoing reasons, the Philips Defendants respectfully request that, in the alternative,  
5 the Court dismiss Costco's claims that are based on its alleged direct and indirect purchases of CRTs  
6 from the Philips Defendants and compel Costco to arbitrate those claims.

7  
8 Dated: May 9, 2013

Respectfully submitted,

9  
10 By: /s/Jon V. Swenson  
Jon V. Swenson (SBN 233054)

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**PROOF OF SERVICE**

I, Jennifer Nguyen, declare:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action. I am employed in the County of Santa Clara, California and my business address is 1001 Page Mill Road, Building One, Palo Alto, California 94304. My email address is Jennifer.nguyen@bakerbotts.com.

On May 9, 2013, I served the foregoing document:

**THE PHILIPS DEFENDANTS' MOTION, IN THE ALTERNATIVE TO DISMISSAL, TO COMPEL ARBITRATION AND SUPPORTING MEMORANDUM**

- ☐ by transmitting via facsimile the document(s) listed above to the fax number(s) set forth below
- ☐ by placing the documents listed above in a sealed envelope with First Class, Certified Mail, Return Receipt Requested postage thereon fully prepaid, and depositing in the United States mail at Palo Alto, California addressed as set forth below.
- ☐ by placing the documents listed above in a sealed Federal Express envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to a Federal Express agent for delivery.
- ☐ by causing the document(s) listed above to be personally delivered to the person(s) at the address(es) set forth below.
- ☒ by transmitting (in "pdf" format) via electronic mail the documents listed above to each of the persons as set forth below.
- ☐ by personally hand delivering the document(s) listed above to the recipients set forth below

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on May 9, 2013 at Palo Alto, California.

/s/Jennifer Nguyen

*In re: Cathode Ray Tube (CRT) Antitrust Litigation - MDL No. 1917***SERVICE LIST**

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